United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2140

Docket No. T-3785
74-2140

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT BEGINS and
PATRICIA BEINGS
Appellants

v.

PAUL PHILBROOK
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 74-43

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE

The District Court granted Defendant's Motion to Dismiss, and dismissed this case on the ground that "... there is no existing case or controversy since the plaintiff's claim is moot." A-10. The issue is whether that decision was correct.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is a civil rights action seeking declaratory and injunctive relief against a regulation of the Vermont Department of Social Welfare, Section 2263.4 of the Welfare Assistance Manual, that makes ineligible for Aid to Needy Families with Children (ANFC) any family owning two operable motor vehicles, without reference to the value of the automobiles. The suit was brought pursuant to 42 U.S.C. 1983, and 28 U.S.C. 2201 and 2202, and jurisdiction was based upon 28 U.S.C. 1343(3)(4). Plaintiffs alleged that the regulation in question violated their rights under the United States Constitution and the Federal laws governing the ANFC program.

II. PROCEEDINGS AND DISPOSITION BELOW

This case was filed on February 11, 1974, and an Amended Complaint was filed on May 15, 1974, and a further Motion to Amend was filed on June 19, 1974. These two motions

to amend were granted on July 15, 1974, as the amendments related to new factual developments in the case. Based on these amended complaints, the Defendant filed a Motion to Dismiss on June 18, 1974, alleging that the case was moot. A hearing on this Motion was held on July 15, 1974, and an Order was filed on July 19, 1974, dismissing the cause of action as moot.

III. FACTS

The facts in this appeal are not in dispute, as the case was dismissed by the District Court based on Plaintiff's Amended Complaint, and Defendant's Motion to Dismiss. The Plaintiffs, Robert and Patricia Begins, live in South Burlington, Vermont, and have five children, ranging in age from four to twelve years. They were and are receiving ANFC benefits from the Vermont Department of Social Welfare, in the category of "unemployed father". A-1. When the Action was filed the plaintiffs owned two automobiles, both of which had little or no resale value. A-2. Mr. Begins is a construction worker, and for the three years preceding the filing of this action had worked for the Bernette Contracting Company from mid-spring to mid-fall, and had used one of the cars to commute to work, while Mrs. Begins used the other car for domestic duties. A-2.

In late November, 1973, plaintiffs applied for ANFC benefits, and this application was denied on November 30, 1973,

on the grounds that Plaintiffs owned two automobiles and refused to sell either one. A second application was submitted on January 21, 1974, and Plaintiffs were granted assistance on the condition that they make a bona fide effort to sell one of the cars. A-8-9. According to the defendant's regulation assistance cannot be granted for more than sixty days if the car is not actually sold.

This action challenging this "two-car" regulation was filed on February 11, 1974, along with a Motion for Temporary Restraining Order. No immediate action was taken in this regard, as plaintiffs' assistance would not have been terminated until the end of April, 1974. At the end of April, 1974, plaintiffs were once again contacted by their caseworker, Miss Jeanne Aucoin, an employee of defendant, and were informed that if they did not transfer ownership of one of their cars, their welfare assistance would be terminated. A-7.

Despite the fact that plaintiffs need and want to keep two cars, they sold one of their automobiles, a 1962 Jeep for $250.00, rather than risking the immediate loss of their welfare assistance. A-7. Plaintiffs did this without speaking to counsel, and in direct response to the threatened termination of their welfare assistance. A-7. Plaintiffs need and want two cars, as Mr. Begins needs a car to look for work, and in his work as a construction laborer, and Mrs. Begins needs a car for domestic affairs. However, they do not wish to jeopardize their continued receipt of welfare assistance, and for that reason

would seek declaratory relief before taking further action in purchasing another car. A-8. Mr. Begins, as a construction worker, is subject to seasonal employment, and has had to seek welfare assistance in the past when he has been laid off, and it is likely he will need assistance in the future for the same reason. A-8.

ARGUMENT

There is only one issue presented for review here, and that is whether the District Court erred in dismissing this case as being moot. As stated previously, the facts in this appeal are not in dispute. Since the District Court granted defendant's motion to dismiss, which was based on plaintiffs' amended complaint showing that they had sold one of their cars, the material allegations of the complaint are taken as true. Jenkins v. McKeithen, 395 US 411, 421, rehearing den 396 US 869 (1966); Cooper v. Pale, 378 US 546 (1963). Thus, the question is whether on the facts pleaded in plaintiffs complaint and the following amendments, this cause of action is moot.

These facts show briefly that when this action was filed, after having been previously denied assistance because of the "two-car" regulation, plaintiffs owned two cars and were thus subject to denial of assistance under this regulation, which provides in its relevant part:

> "One automobile per assistance group, regardless of its value, shall be excluded from consideration within the limitation on combined resources. Ownership of more than one automobile by members of an assistance group shall disqualify the group ..."
> Welfare Assistance Manual 2263.4

There are exceptions to this disqualification which are not relevant here. The regulation also provides:

> "When an applicant indicates willingness to sell additional vehicles which would otherwise disqualify an assistance group, and all other eligibility requirements are met, assistance may be granted provisionally, for a period not to exceed 60 days, pending disposition of such additional automobiles. If sale is not completed within 60 days, assistance shall be terminated."
> Welfare Assistance Manual 2263.4

The plaintiffs had been granted assistance provisionally on the condition that they sell their second car within 60 days, and they then filed this action seeking declaratory and injunctive relief. Although a hearing on a temporary restraining order had been scheduled, no action was seen necessary in this regard, as the 60 day period had not expired. At the end of this period plaintiffs were contacted again by their caseworker and informed that assistance would soon be terminated if they did not dispose of the car, and rather than talking to their counsel about this, plaintiffs did sell their second car, rather than risking the termination of assistance.

However, as their amended complaint states in its most relevant part, plaintiffs still "... need and want two cars ... However they do not wish to jeopardize their continued receipt of welfare assistance, and for that reason would seek declaratory relief before taking further action." A-8. If plaintiffs had consulted their counsel before selling their second car, he would have informed them, as he had previously, that a temporary restraining order could be sought when the 60 day period expired. However, they did not do this and in direct response to a threat of immediate loss of welfare assistance, they sold their second car. Nonetheless, they still want to own two cars, and feel they need two cars, but do not want to purchase another car at this time, and risk either the loss of assistance or having to sell this car, with the accompanying expenses, if their legal position is not sustained. Thus, they sought and are seeking declaratory relief before taking any further action to buy another car.

Based on this statement of facts, the District Court concluded "... there is no existing case or controversy since the plaintiffs' claim is moot." A-10. Plaintiffs submit that there is absolutely no resolution of the controversy, since they still want to own two cars, and are still getting welfare assistance, and thus are subject to defendant's "two-car" regulation. Plaintiffs have not agreed to make do with one car, and thus

eliminate the controversy. They only sold their car to ensure continued receipt of welfare assistance, and are seeking declaratory relief before taking further action.

Obviously, they could go out right now and purchase another car, and place themselves back in their initial situation. However, it is submitted that, for purposes of a declaratory judgment, they need not do that, but can ask for an adjudication of their rights, before taking any further action. Initially, plaintiffs had requested declaratory and injunctive relief, and possibly injunctive relief would not be appropriate at this time, see Zwickler v. Koota, 389 US 241, 254 (1967), and plaintiffs have dropped their request for injunctive relief, but declaratory relief is most appropriate at this time.

Since the District Court's order concluded that the case was moot, and there was no existing case or controversy, all aspects of this question will be treated, as a case which is not within the general definition of mootness, may still not present a justiciable case or controversy. Since all these questions are jurisdictional, and since the line where mootness blends into other doctrines of justiciability is grey, plaintiffs thought it best to try to deal with these questions separately.

A. GENERAL STANDARDS AND SUMMARY OF ARGUMENT

Although this brief will try to treat separately the questions of mootness and other jurisdictional problems presented by the terms 'case or controversy', it is best to begin with what is perhaps the clearest definition of the term 'controversy' as it is used in the Federal Declaratory Judgment Act, as this will set general standards to be followed. Even though plaintiffs are now only seeking declaratory relief, they realize that by the terms of Article III, Section 2 of the U. S. Constitution, and also by the terms of the Declaratory Judgment Act, 28 USC 2201, jurisdiction of the federal courts is contingent upon the existence of an actual case or controversy. The U. S. Supreme Court clearly explained this in Aetna Life Insurance Company v. Haworth, 300 US 227 (1936) when it stated:

> "The Constitution limits the exercise of the judicial power to 'cases' and 'controversies ...' the Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy', manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense ... Thus the operation of the Declaratory Judgment Act is procedural only ..." Id at 239-240.

In the Aetna case the Supreme Court also discussed the term 'controversy' as it is used in the Declaratory Judgment Act, and held that a 'controversy':

> "... must be one that is appropriate for judicial determination ... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot ... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests ... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts ... Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages ... And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not necessary." Id at 240.

This definition sets forth all of the requirements of justiciability that flow from the term 'controversy', of which mootness is only one area. However, since the case at bar must satisfy all of these requirements, a broader discussion than one limited strictly to 'mootness' problems is required, and will be set forth shortly. At this point, suffice to say that this case satisfies each criteria listed above. There is a definite and concrete controversy - plaintiffs wish to purchase a second car and defendant's regulation forbids this; the controversy touches the legal relations of the parties as plaintiffs are subject to

defendant's regulation, it is a real controversy rather than an abstract or hypothetical one - plaintiffs have already had assistance denied once for this same reason, and have possessed two cars in the past and wish to possess two cars again; the controversy is capable of specific relief by the issuance of a declaratory judgment declaring the respective rights of the parties. In summary, plaintiffs submit that they satisfy all the jurisdictional requirements of the 'case and controversy' clause and that the District Court erred in dismissing the complaint.

B. MOOTNESS

Although mootness is a very difficult concept to define precisely, there are some accepted standards to be followed. The U. S. Supreme Court defined the term recently in Powell v. McCormack, 395 US 486 (1968) where it said:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Id at 496.

In that decision the Supreme Court cited to a leading treatise on the subject, Borchard, Declaratory Judgments, 2nd edition, wherein the following definition is found:

> "Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic, or dead. The distinguishing characteristic of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations. The issue is either not yet ripe

> for determination, because no opposing claim or right has yet been asserted or advanced or has arisen and hence no actual or potential conflict can be established, or else the issue has ceased to be live or practical, because the facts have changed, either by settlement of the controversy or by alteration in the circumstances of the parties or subject matter, so as to make the judgment not decisive or controlling of actual and contested rights, but a pronouncement having academic interest only." Id at 35.

Here, the issue is still live, as plaintiffs still want to own two cars, and a decision here would definitely affect existing legal relations between the parties. If plaintiff's legal contentions were upheld, plaintiffs would immediately purchase a second car, and thus this is not a situation which in any way would involve merely 'academic interests'. Plaintiffs are vitally interested in the outcome of this case, and although they may not be suffering any irreparable injury by being denied the right to own two cars, this is not a necessary part of a declaratory judgment action. Aetna Life Insurance Company v. Haworth, supra, at 240.

The parties have already asserted opposing claims which establish a conflict, and there is nothing fictitious, colorable or hypothetical about the issues. To suggest that plaintiffs do not have a live interest in the controversy, when they already have been denied assistance once for their refusal to sell their second car, and have had a continuing dispute with the defendant, which exists right now, is to deny the

obvious. In their amended complaint, they allege, at a bare minimum, that they want a second car and do not have it solely because of the attacked regulation. At its most basic level, this alone would appear to plaintiffs to refute a finding of mootness. If the parties are still disputing, how can the case be moot? The question as to whether plaintiffs have to buy another car before the case is justiciable will be discussed later in the section dealing with other aspects of the 'case or controversy' requirement, but the mere existence of such a question indicates that the case is not moot.

If plaintiffs accepted the fact that they could not own two cars and no longer wanted a second one, the case clearly would be moot, as the decision would be an academic one only. A similar action was filed by this attorney raising the same questions, Dresser v. Philbrook, Civil No. 74-44, but a stipulation dismissing the case was filed because plaintiff sold her car, and did not want to own two cars. Similarly, if plaintiffs were no longer receiving welfare assistance, and thus not subjected to defendant's regulation, serious mootness problems would arise, although plaintiffs would still contend that the issue was not moot, as the problem would then become 'capable of repetition, yet evading review.' Super Tire Engineering Company v. McCorkle, 42 USLW 4507 (April 16, 1974). But under the present circumstances, plaintiffs do not see how, by any application of the existing mootness doctrine, the case is moot.

The District Court cited two cases in support of its conclusion in this matter, the first being Golden v. Zwickler, 394 US 103 (1969). The Zwickler case involved a challenge to a New York law prohibiting certain types of political handbilling. The plaintiff had been convicted in state court of violating this law, and this conviction was subsequently reversed on state law grounds. The plaintiff then filed an action in federal court for declaratory and injunctive relief, alleging that he desired to distribute handbills against a particular candidate, and because of his previous prosecution he was in fear of taking this action. Thus, the factual situation presented in his complaint was quite similar to that of the present plaintiffs, who have already been denied assistance once for violation of the "two car" regulation, and who now allege that they wish to own two cars again, but are afraid to take that action and seek declaratory relief first.

In Zwickler, the District Court had initially abstained, and the Supreme Court reversed this decision, holding that abstention was improper, and remanded it for a decision on the merits, including mootness. Zwickler v. Koota, 389 US 241, 252 p. 16 (1961). On remand, it was found that the candidate for political office that plaintiff had handbilled in the past, and whom plaintiff alleged in his complaint that he desired to handbill again in the future, was no longer a candidate for any office, and was a judge on the Supreme Court of New York. Although the district court found that this still did not make

the case moot, 290 F. Supp. 244, 249 (1960), the Supreme Court reversed this.

Reading the complaint as raising only the right to handbill this particular candidate, the Supreme Court was of the opinion that no live controversy still existed, as this former candidate for political office had a fourteen (14) year term of office as judge. Quoting from previous decisions the Court stated:

> "Basically, the question in each such case [under the Declaratory Judgment Act] is whether the facts alleged under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. (emphasis added) Golden v. Zwickler, 394 US at 106.

Since the Court read the complaint in Zwickler as raising only the right to handbill a particular candidate, who was by then serving a 14 year term as a judge and thus the likelihood of his becoming a candidate in the near future was quite remote, it is clear that there no longer was any controversy. Had the complaint been read as alleging a right to handbill other candidates, or had this particular candidate still been in the field, the elements of a controversy would have been more obvious. See, 6A Moores Fed. Prac. 57-123.

Thus, the Zwickler case is clearly distinguishable from this case. Here, the controversy still exists, and it is

submitted that the prior history of the plaintiff and defendant establish the immediacy and reality of the problem. In Zwickler if a decision was rendered allowing plaintiff to handbill the candidate he sought, the decision would have been of no effect, as the candidate would no longer be running for office. That presented a perfect example of a purely 'academic' decision. Here, a decision for plaintiffs would have an immediate effect, as plaintiffs would then purchase a second car. Thus, the contrast between these two situations helps illustrate why this case is not moot. By the Supreme Court's stressing the fact that the candidate plaintiff wanted to handbill was no longer seeking office, the necessary implication is that if the candidate had still been seeking office, the Court would not have held the case to be moot, although the plaintiff had ceased his handbilling, as plaintiffs here have sold their second car. In that situation the reasoning of the district court would apply, wherein the court recognized that the prudent alternative for the plaintiff, rather than taking the desired action and handbilling the candidate and risking arrest, was to institute a declaratory judgment action before doing anything further. Similarly, in our case, the prudent action for plaintiffs was to seek declaratory relief before purchasing another car. This line of cases, holding that it is not necessary to violate a law or regulation before seeking declaratory relief will be discussed in detail in the next section of this brief.

The other case cited by the district court in its Order was North Carolina v. Rice, 404 US 244 (1971). In that case, the plaintiff had been convicted in a state court and was sentenced to a 9 month prison term. He appealed this decision, got a trial de novo, and was then sentenced to a 2 year prison term. He brought a habeas corpus action in federal district court, which was dismissed, and then he appealed. By this time his two year sentence had been completed, but the Court of Appeals held the case was not moot, and ordered the record expunged.

The Supreme Court reversed this and remanded the case for reconsideration of mootness. The court indicated that in a habeas corpus proceeding, unless it is shown that some disadvantage results from having served a longer sentence, the case would be moot, since the sentence has already been served. Once again, this is a clear example of mootness, for, unless there was some future disadvantage to inure to plaintiff from his having served a 2 year rather than a 9 month sentence, a decision in his behalf could have absolutely no effect. The sentence was already served, and absent a showing of any other prejudice to which the plaintiff would be subjected by having served a longer sentence, any decision would merely be academic. Thus, as in Zwickler, the over-riding question that appears is what practical and realistic purpose can be served by a favorable judgment. If there is no such purpose, the case is moot. In our case, a

favorable judgment would serve a very realistic purpose and have a direct and immediate effect, and for that reason, neither of the cases cited by the district court is persuasive on the question of mootness. Rather, they, by contrast, illustrate why this case is not moot.

A somewhat analagous fact situation to ours was presented in Police Dept. of Chicago v. Mosley, 408 US 92 (1971). That was a suit for declaratory and injunctive relief attacking a Chicago ordinance that prohibited all picketing within 150 feet of a school, except peaceful labor picketing. The plaintiff had, for 7 months prior to the adoption of the ordinance, frequently picketed a school. After the ordinance was passed but before it was effective, plaintiff called the Police Department to find out how the ordinance would affect him, and was told that if his picketing continued, he would be arrested. On the day before the ordinance became effective plaintiff ended his picketing and brought his action, alleging that he wanted to continue picketing. Id at 93.

The Court did not even suggest that the case was moot, merely because plaintiff had ended his picketing, as plaintiffs here sold their second car. The analogy is complete in that by past history both sets of plaintiffs indicated a course of conduct (picketing in one;owning two cars in another), which was prescribed by a law or regulation, and both plaintiffs ended

their course of conduct, but did not abandon the desire to engage in that conduct in the future, and merely wanted declaratory relief rather than subjecting themselves to certain sanctions for the continuance of their conduct. Neither of these cases are abstract or hypothetical,as both involved prior histories of concrete action that violated a particular law or regulation. Both of these cases represent situations where a favorable decision for the plaintiffs would have an immediate and direct effect, as a past course of conduct would be resumed.

It is helpful to look briefly at some other cases that were dismissed as being moot, to observe once again the essential differences between those cases, and the present one. For that purpose plaintiffs will use the list of cases cited in defendant's Memorandum in Support of Motion to Dismiss. The first case cited is Concerned Citizens v. Volpe,445 F2d 486, (5 Cir. 1971), where plaintiffs sought declaratory and injunctive relief after being displaced from their residence by the construction of a highway. Their claim was that the federal government had not provided sufficient relocation assurances as required by statute. At the time of review by the courts, the plaintiffs had all accepted relocation, and were not seeking to move back. The court therefore properly concluded that the case was moot, since the plaintiffs could no longer benefit from any decision and declaratory relief would be "futile". Id at 491.

Once again, mootness is clearly indicated by the fact that a favorable decision could have no practical effect, unlike a favorable decision in our case. In our case, Concerned Citizens would only be applicable if plaintiffs accepted the limitation of one car, and did not seek to own a second.

Another case cited was Caldwell v. Craighead, 432 F2d 213 (6 Cir. 1970), cert den 402 US 953, wherein the plaintiffs, a son and mother, challenged the action of school officials in suspending the son from the school band, and the mother from her job as a teacher's aid. By the time of the hearing the plaintiffs had moved to another school district, and the son was attending another school. The court held his claim to be moot, as the requested declaratory and injunctive relief would serve no purpose, but held the mother's claim was not moot, since she was seeking monetary damages. Once again, mootness results from the fact that a favorable decision could have no effect. If plaintiffs in our case moved from Vermont, their case clearly would be moot, as a decision would serve no purpose. But a decision in the present context would serve a very real purpose.

Similarly, Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973); Smothers v. Columbia Broadcasting System, Inc., 351 F. Supp. 622 (D. Cal. 1972); and Schwimmer v. U.S., 252 F2d 866 cert den 352 US 833 (1956) all are good examples of moot cases, wherein it would be impossible for the court to have issued an order affecting the legal relations of the parties. In all of the cases the controversy was

truly dead; and a favorable decision would have been academic. In this case, the dispute still exists, and plaintiff cannot see how it could possibly be argued that a favorable decision would have no affect, as plaintiffs would immediately purchase a second car.

One final point to be mentioned here concerns the fact that plaintiffs have already had welfare assistance denied to them, based on the two-car regulation. When plaintiffs filed a Motion to Amend their complaint to add this factual allegation, and to amend their Prayer for Relief to seek a declaration that this past denial of assistance was unconstitutional and that monetary damages be awarded for this alleged unlawful denial of assistance, A-9, defendant's filed a Memorandum in Opposition to Motion to Amend Complaint, Document No. 16 of the Record. That Memorandum cited the recent Supreme Court decision of Edelman v. Jordan, 94 Sup. Ct. 1347 (1974), wherein it was held that federal courts are barred by the Eleventh Amendment from awarding retroactive damages in the form of welfare payments to private parties, payable from public funds maintained by a state, unless the state consents. Clearly, by filing this Memorandum the State indicated that it did not so consent to being sued, and thus this claim for damages, which normally would never be moot, has been rendered moot because the court could not order any such payments, and a declaration would clearly be futile.

However, although this claim for damages for the past denial of assistance has been mooted out by Edelman, it is submitted that it adds to the concreteness of plaintiffs' present request for declaratory relief, and puts the State in the position of first refusing to consent to be sued for damages and thus claiming mootness for the past alleged wrong, and now claiming mootness because plaintiff, out of fear of a similar denial of assistance, temporarily disposed of their second car and seek declaratory relief before purchasing another car.

For these reasons it is submitted that this case is not moot, but is very alive, with the parties possessing a legally cognizable interest in the outcome. Powell v. McCormack, supra, at 496. As was stated in Borchard, Declaratory Judgments, 2nd Edition, the distinguishing characteristic of moot issues is:

> "... that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations." Id at 35.

It is submitted that by the above, plaintiffs have demonstrated what appears to them obvious, that a decision here could and would 'definitely affect existing legal relations', and thus the basic mootness test is satisfied.

C. APPROPRIATENESS OF DECLARATORY RELIEF

Aside from the issue of mootness, there are other related jurisdictional requirements that flow from the constitutional and statutory mandates that a 'case or controversy' must

exist before a declaratory judgment can be issued, and this section of plaintiffs brief will deal with those issues. In many ways they are tied to the mootness considerations, and since the district court's Order tied mootness to the case or controversy requirement, it may not be possible to totally separate the considerations, but plaintiffs did feel there were enough differences to treat the issues separately.

In Aetna Life Insurance Company v. Haworth, supra, the Supreme Court listed the many considerations that must be met in order for a declaratory judgment to be rendered. It stated:

> 'A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot ... The controversy must be definite and concrete, ... (emphasis added). Id at 240.

Thus, in addition to mootness considerations, i.e. is the controversy dead, there are also considerations as to the abstractness, definiteness, and concreteness of the case, which will also decide if the case is an appropriate one for declaratory relief, and it is to these issues that this section will be addressed.

The Supreme Court recognized the inherent difficulties in this area in the case of Maryland Casualty Company v. Pacific Coal Company, 312 US 270 (1941), when it stated:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (emphasis added)
> Id at 273.

Thus, the question to be answered here is whether, where the facts show that plaintiffs had been denied assistance previously for possessing two cars, and then they sold one car, and now seek declaratory relief before purchasing another car, there is a substantial controversy between the parties of sufficient 'immediacy and reality' to warrant the issuance of declaratory relief. Clearly, if plaintiffs owned two cars there would be no question of mootness or whether a 'controversy' exists, and thus the further question is whether the plaintiffs must now purchase another car to present a justiciable controversy, or whether it is enough that they want another car, but, based on past conduct, seek declaratory relief before purchasing a second car.

Plaintiffs submit that the controversy is real and immediate enough to warrant declaratory relief, and further submit that this case presents a classic example of what the Declaratory Judgment Act is all about. Obviously, plaintiffs could

go out now and purchase another car, and there then would be no question of justiciability, but if they do this they are taking a risk. If a court were to rule against them on their legal contentions after they bought another car, they would have two choices: either keeping the car and losing their welfare assistance, or selling the car, with the resultant losses in money caused by sales tax, registration, purchase and use tax, inspection, etc. Thus, they would be proceeding with a very real possibility of incurring some sort of damage to their position if their legal contentions were not upheld. It is submitted that the Declaratory Judgment Act was specifically enacted to allow persons to get a declaration of rights before they took any action, so as to avoid the accrual of damages.

The leading treatises and many cases recognize this essential ingredient of declaratory relief. In 6A Moore's Fed. Prac., it is stated:

> "The uniqueness of the declaratory remedy lies rather in its potential prophylactic character ..." Id at p. 57-72.

In Abbott Laboratories v. Gardner, 397 US 136 (1966), an action was filed by various drug companies seeking declaratory relief against regulations promulgated by HEW concerning the labelling of drugs. The government argued that since there was no enforcement yet of the regulations, there was no case or controversy, just as the State is arguing here that since plaintiffs do not own two cars there assistance is not in jeopardy, and thus there is no case or controversy. The Supreme Court rejected that argument stating:

> "These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemna that it was the very purpose of the Declaratory Judgment Act to ameliorate ... Either they must comply with the ... regulations and incur the costs of changing over their promotional material and labelling or they must follow their present course and risk prosecution ..."
> Id at 152.

The same type of dilemna is faced by plaintiffs here, and the same relief can be afforded by declaratory judgment.

A case decided by this court analogous to the present one on the question of appropriateness of declaratory relief is American Machine and Metals, Inc. v. DeBothezat Impeller Company, 166 F2d 535 (2 Cir. 1948). In that case the plaintiff sought declaratory relief as to the validity of exercising a power of termination contained in an agreement between the plaintiff and defendant. In its complaint the plaintiff alleged that it "... desires and intends to exercise its right of termination and desires and intends to continue in the business ..." Id at 596. This allegation is obviously similar to plaintiffs' present complaint wherein they allege that they "... need and want two cars ..." but although they intend to buy another car, sought declaratory relief first.

In the American Machine case, the complaint went on to allege that the defendants had informed the plaintiff, that if they terminated the agreement the plaintiff had no right to continue in the business, and would be sued if they did so. They

concluded by stating that although plaintiff intends to terminate the contract, like plaintiffs here intend to purchase a second car, they wanted declaratory relief as to the respective positions if termination would occur, so as to "avoid the possible accrual of damages." Id. Thus, the analogy is complete as plaintiffs here seek declaratory relief before taking further action to avoid the possible accrual of damages.

In the American Machine case the district court had also dismissed the claim, saying no controversy existed because the plaintiff had not yet terminated the agreement, and may never do so. This Court reversed that decision stating:

> "We think the judge construed the [Declaratory Judgment] statute too narrowly. As the Supreme Court said in Maryland Casualty Co. v. Pacific Coal Co., supra, the difference between an abstract questions and a 'controversy' is one of degree. If notice of termination had been given, the defendant apparently concedes that there might be an actual controversy ... Before termination the controversy is one step further removed from actuality, but not so far removed as to present only an abstract question, in our opinion. Once the notice of termination is given it is beyond recall; the dispute between the parties concerns the right of the plaintiff to continue business if that contingency happens. Where there is an actual controversy over contingent rights, a declaratory judgment may nevertheless be granted ... After bringing the contingency to pass it will be too late to avoid an action for damages if the plaintiff acts as he intends by continuing the business. The very purpose of the declaratory judgment procedure is to prevent the accrual of such avoidable damages ... By the decision below the appellant here must 'act on his own view of his rights' and risk an otherwise profitable business in order to present a justiciable

> 'controversy'... The Declaratory Judgment Act was designed to obviate just this sort of peril, and we believe its benefits should be available to one in the appellant's situation." Id at 536-7.

This well-reasoned opinion is directly applicable to the present case. If plaintiffs purchased a second car there would be no question of justiciability, just as if the American Machine plaintiffs had given notice of termination. Before purchasing a second car, by merely alleging a desire to purchase, the controversy is one step removed from actuality, just like the controversy in American Machine was, before notice of termination was given. However, as this Court held in American Machine, the controversy presented now is not so far removed from actuality, so as to present only an abstract question, especially in view of the prior history of the case, and the fact that plaintiffs have always had two cars, and allege they want to own two in the future, and there is absolutely no basis to doubt that they would purchase a second car if a favorable decision was rendered for them.

However, if they did purchase another car now, they would, as this Court phrased it, be acting on their own view of their rights and be risking the accrual of avoidable damages, for which the Declaratory Judgment Act was specifically enacted to avoid. The real concern is whether the controversy is so far removed from actuality so as only to pose an abstract question, and it is submitted that this is not the case here.

Similar reasoning was followed in Keener Oil and Gas Co. v. Consolidated Gas Utility Corp., 190 F2d 985 (10 Cir. 1951), which cited the American Machine case. In Keener, the plaintiff sought declaratory relief as to rights to the use of a natural gas pipeline. In upholding the appropriateness of declaratory relief the Court stated:

> "There existed an actual and continuing controversy ... as to whether the transportation of gas ... would constitute a violation of the contract ... In such a situation, a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages or other untoward consequences ..." Id at 989.

In our case, it is not disputed that the purchase of a second car by plaintiffs will be in violation of defendants regulation, and thus plaintiffs should not be required to take such action as will constitute the breach before he can get a declaration of rights. Many other cases recognize this fundamental principal of declaratory relief. In Hardware Mutual Casualty Co. v. Schantz, 178 F2d 779 (5 Cir. 1949), it was stated:

> "The purpose of the Declaratory Judgment Act is to settle 'actual controversies' before they ripen into violations of law or a breach of some contractual duty." Id at 780.

In Delaney v. Carter Oil Company, 174 F2d 314 (10 Cir. 1946) cert den 338 US 824, it was stated thus:

> "One of the highest offices of declaratory procedure is to remove uncertainty and insecurity from legal relations, and thus clarify, quiet and stabilize them before irretrievable acts have been undertaken." Id at 317.

In Aetna Casualty and Surety Co. v. Quarles, 92 F2d 321 (4 Cir. 1937), the Court stated the purpose of declaratory relief to be:

> "... to settle legal rights and remove uncertainty and insecurity without awaiting a violation of the rights or a disturbance of the relationship." Id at 325.

For similar holdings, see Scott-Burr Stores v. Wilcox, 194 F2d 989 (5 Cir. 1952); Clark v. Memolo, 174 F2d 978 (D.C. Cir. 1946); McGraw-Edison Co. v. Preformed Line Products Co., 362 F2d 339 (9 Cir. 1966) cert den 385 US 919; Izaak Walton League of American v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970); King Kup Candies v. H. B. Reese Co., 134 F. Supp. 463 (M.D. Penn. 1955); Paramount Picture Corp. v. Holden, 166 F. Supp. 684 (S.D. Cal. 1958).

Thus, these cases make clear that declaratory relief is appropriate where the action which will cause a dispute has not yet taken place, and further that it was a basic purpose of the Declaratory Judgment Act to provide a remedy before the action was taken, to avoid the damage that could occur if the action were taken. As the Supreme Court indicated in the Maryland Casualty case, and as this Court indicated in American Machine, the only question to be determined is whether the question is so abstract, and so far removed, from actuality, so as not to present a 'controvery.' It is submitted that the prior history of the

parties here would require a finding that the question is not so abstract, and is only one step removed from actuality, as this Court found in American Machine. The only untaken action is the actual purchase of a second car, which the plaintiffs want to purchase immediately, and thus the situation is not filled with various contingencies that would make the controversy abstract or hypothetical.

It would be helpful, to analyze several cases where 'controversies' were held not to exist, to emphasize the differences present here. In Liberty Warehouse v. Grannis, 273 US 70 (1926), a corporation filed an action for declaratory relief to declare their rights under a law just passed. The Supreme Court held there was no 'case or controversy' stating:

> 'The sole purpose of the petition ... is to obtain a declaration ... of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions ... While the Commonwealth Attorney is made a defendant... there is no semblance of any adverse litigation with him individually, there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for violation of the Act, either past or prospective." (emphasis added) Id at 73.

Clearly, in Liberty Warehouse, the questions posed were abstract and hypothetical; there were no allegations of action done or contemplated that would violate the act. All that was asked for

was a general declaration of rights, in the abstract. In our case there is a clear allegation that plaintiffs want to buy a car, and it is undisputed that this violates defendant's regulations. If plaintiffs were requesting a general ruling on any actions on their part that might violate the welfare code, it is clear the questions would be hypothetical and abstract. However, what they request is a specific ruling on a specific fact situation, which they have found themselves in the past and wish to put themselves in at the present.

A similar example and well-reasoned discussion is found in a recent case decided by this Court, Abele v. Markel, 452 F2d 1121 (2 Cir. 1971). There, three groups of plaintiffs were seeking declaratory and injunctive relief in regard to an anti-abortion statute. The three groups were: non-pregnant women; pregnant women; and medical professionals. In finding that the non-pregnant women did not present a 'controversy' the court stated:

> "The existence of a case or controversy depends upon whether the person seeking relief have alleged a sufficient personal stake in the outcome to assure that the court will be called upon to resolve real issues between genuine adversaries rather than merely to give advisory opinions with respect to abstract or theoretical questions. It is settled that advisory opinions may not be given by federal courts, and that the constitutionality of laws may be challenged only by those litigants who will suffer some actual or substantial injury from their enforcement, as distinguished from a remote, general, or hypothetical possibility of harm. Id at 1124.

This Court concluded that non-pregnant women "... do not allege a sufficient threat of personal harm ..." and that the threat to them was remote and hypothetical, Id, as the Court cited many examples of why they might never suffer harm from the statute, i.e. might never become pregnant; might decide against an abortion if they do become pregnant; might move, etc. The Court did hold that the pregnant women did have standing, stating:

> "... the prospective enforcement of such statutes prevents the mother from deciding not to bear the child." Id at 1125.

The comparison of these two groups of women, and the reasoning applied, show why plaintiffs here do present a justiciable controversy. With the non-pregnant women, the question was totally abstract and remote, and many steps removed from actuality. This reasoning followed reasoning previously cited, and applied it to two fact situations. The remoteness of the question for non-pregnant women is clear, and the many intervening factors that could have prevented the controversy from ever occuring were obvious. For pregnant women, the question was only one step removed from actuality, like our case. There are no intervening factors that could prevent our controversy from occurring. All the pregnant women lacked was having had an abortion, and they alleged that they wanted one. All plaintiffs lack here is actual ownership of a second car, and they

allege that they want one. The Court in Abele did not require that the abortion be performed to create a 'controversy' just as this Court should not require that a second car be purchased to present a controversy. The Abele Court also found that the third group of plaintiffs, medical professionals, also presented a 'controversy' and that they should not be required to perform abortions, in violation of the statute, in order to get declaratory relief. Id at 1125.

A final case to be considered is Evers v. Dwyer, 358 US 202 (1958). There, a black resident of the city brought a declaratory judgment action to ascertain his right to travel on city buses without being subjected, as required by law, to segragated seating. The district court dismissed the case on the ground that no 'actual controversy' existed, as the plaintiff had ridden the bus only once, and when he was asked to move back or be arrested, he left the bus. Id at 203. In reversing this the Supreme Court held:

> "The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an 'actual controversy' over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space on such vehicles assigned to colored passengers ..." Id at 204.

The Supreme Court did not find mootness because the plaintiff had left the bus, rather than being arrested, just as mootness should not be found here because plaintiffs sold their second car upon the threatened termination of their welfare assistance. Similarly, just as the plaintiff in Evers should not have to risk arrest by boarding the bus again to present an 'actual controversy', the plaintiffs here should not have to risk termination of their welfare assistance by purchasing another car, in order to present an 'actual controversy'.

CONCLUSION

This case is not moot as the issue is not dead in any manner of speaking, and a continuing controversy exists between real parties with adverse legal interests. The keynote to a finding of mootness is that a decision would be of academic interest only, affecting no actual rights. Here, a favorable decision for plaintiffs would have an immediate impact, as they would immediately purchase a second car.

Turning to other considerations of 'case or controversy' the major consideration is whether the case presents hypothetical or abstract questions, as opposed to concrete fact situations demanding relief. Analysis of the facts here, when compared to precedents cited, shows that the question posed here is not abstract, but is real, concrete, and capable of judicial resolution. It satisfies all of the requirements laid down in Aetna Life Insurance Company v. Haworth, supra, and declaratory relief

would effectuate the basic purpose of the Declaratory Judgment Act of providing relief before action is taken that could result in damage.

As this Court stated in Maryland Casualty Company v. Rosen, 445 F2d 1012 (2 Cir. 1971), declaratory relief is proper only:

> "... 1) where the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; or 2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceedings." Id at 1014.

Both of these purposes will be well-served by the issuance of a declaratory judgment in this case, and thus plaintiffs would request that the Order of the District Court be reversed, and the case remanded for a prompt hearing on the merits.

Respectfully submitted,

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Dated: _____ By: _____

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